United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL.

74-1012

B

74-1012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEON SEGAN,

Plaintiff-Appellant,

-against-

DREYFUS CORPORATION, MARINE MIDLAND BANKS, INC., DREYFUS MARINE MIDLAND MANAGEMENT CORP., INTERNATIONAL TELEPHONE AND TELEGRAPH CORP., LAZARD FRERES & CO., HOWARD STEIN, RICHARD A.M.C. JOHNSON, JULIAN M. SMERLING, LAWRENCE M. GREENE, FELIX G. ROHATYN, ANDRE MEYER AND THE DREYFUS FUND, INC.,

Defendant-Appellees.

On Appeal From the United States District Court,
For the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

KAPLAN, KILSHEIMER & FOLEY
Attorneys for Plaintiff-Appellant
122 East 42nd Street
New York, New York 10017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

QUESTIONS PRESENTED

1. Does a complaint meet the particularity requirement of Rule 9(b), F.R.Civ.P., if it particularizes the conclusory allegations of fraud with description, in terms of ultimate facts, of the fraudulent course of conduct complained of and illustrates the method of operation by stating the details of one typical transaction?

2. Are defendants entitled to further particularization of a complaint which does plead ultimate facts when they never have claimed any inability or difficulty in responding to the complaint as served?

3. Should a plaintiff be permitted discovery for the purpose of either furnishing a more definite statement or framing an amended complaint where defendants are in exclusive possession of the additional facts required to plead the alleged fraud with the particularity insisted upon by defendants and where direct utilization by plaintiff of evidentiary facts revealed in a confidential pre-complaint investigation would expose the identity of an informant and other work-product?

4. Where no need has been claimed or shown for access by opponents to an attorney's work-product does Rule 9(b) F.R.Civ.P. require disclosure in a complaint of evidentiary details uncovered in the course of such work-product when the ultimate facts of the fraud have already been pleaded?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEON SEGAN,

Plaintiff-Appellant,

-against-

DREYFUS CORPORATION, MARINE MIDLAND BANKS, INC., DREYFUS MARINE MIDLAND MANAGEMENT CORP., INTERNATIONAL TELEPHONE AND TELEGRAPH CORP., LAZARD FRERES & CO., HOWARD STEIN, RICHARD A.M.C. JOHNSON, JULIAN M. SMERLING, LAWRENCE M. GREENE, FELIX G. ROHATYN, ANDRE MEYER, AND THE DREYFUS FUND, INC.,

Defendants-Appellees.

BRIEF FOR LEON SEGAN, PLAINTIFF-APPELLANT

This is an appeal by plaintiff-appellant from an Order of the United States District Court for the Southern District of New York, Cannella J. (A-63-65)*, filed on May 12, 1973 directing the plaintiff to file a more definite statement and from a further Order (A-90,91), filed October 25, 1973 denying plaintiff's motion for discovery and granting defendants' cross-motion

*References in parentheses are to pages of the Joint Appendix.

for dismissal of the Amended Complaint (the "Complaint").

THE FACTS

Plaintiff sued derivatively on behalf of defendant Dreyfus Fund, Inc. (the "Fund"), charging defendant Dreyfus Corporation, acting with the other defendants (other than the Fund), in conclusory form, as follows:

> During the period from and after the year 1969 the defendants Dreyfus Corporation, Howard Stein ("Stein"), Richard A.M.C. Johnson ("Johnson"), Julian M. Smerling ("Smerling") and Lawrence M. Greene ("Greene"), for their personal profit and to promote the business success of Dreyfus Marine Midland Management Corp., with the knowledge, consent, cooperation and assistance of the other defendants (other than the Fund), relying upon and utilizing the advantageous position of fiduciaries and investment advisors of the Fund:
>
> (i) Engaged in acts and practices, involving personal misconduct, constituting a breach

of the fiduciary duties which they owed to the Fund;

(ii) employed a device, scheme or artifice to defraud the Fund;

(iii) engaged in transactions, practices and a course of conduct which operated to defraud and deceive the Fund;

(iv) acted in concert with defendants Lazard Freres, Rohatyn and Meyer who, as brokers for a party or parties, other than the Fund, knowingly effected the sale of securities to the Fund, without prior disclosure in writing to the Fund, of the circumstances and capacity in which they were acting in concert with the said defendants Lazard Freres, Rohatyn and Meyer and without obtaining the consent of the Fund to such transaction or transactions; and

(v) engage in acts practices and a course of conduct which, as to the Fund, was

fraudulent, deceptive and manipulative. See Complaint* paragraph 20 (A-11,12).

These conclusory charges are supported in the Complaint by particularized allegations charging that the defendants (other than the Fund) engaged in a course of conduct whereby Dreyfus Corporation used its power and control over the buying power and financial resourses of the Fund to engage in transactions for the benefit of Dreyfus Corporation in violation of its fiduciary duties to the Fund. See Complaint paragraphs 20,23,25 and 26 (A-11,12,15,16).

The Complaint further charges that in the proxy statements which Dreyfus Corporation caused to be issued annually to the shareholders of the Fund for the purpose of obtaining approval of the rehiring of Dreyfus Corporation as investment manager and advisor of the Fund, there was a failure to disclose the above mentioned self-dealing and breach of fiduciary duty by Dreyfus Corporation. See Complaint paragraph 28 (A-17).

*Mention herein of the "Complaint" is intended to refer to the Amended Complaint a copy of which is set forth in the Appendix. (A-7-21).

These charges were further particularized in the Complaint as follows:

(a) Dreyfus Corporation acted as investment manager and advisor to the Fund under an agreement, renewed annually, which described its obligations to the Fund. These duties included the gathering of data, the formulation and implementation of investment programs, placing orders for the purchase and sale of securities and furnishing services of executive and clerical personnel as required to perform administrative functions. By reason of its position as investment manager and investment advisor of the Fund, Dreyfus Corporation and its officers and directors dominated and controlled the business operations and affairs of the Fund. See Complaint paragraphs 7,16 (A-8,9,11).

(b) Defendant Dreyfus Marine Midland Management Corp. ("Dreyfus Marine"), a New York

corporation is a joint venture undertaken by Dreyfus Corporation with defendant Marine Midland Banks, Inc. ("Marine Midland"). Since August 1970 Dreyfus Marine has provided investment management and advisory services to pension funds, profit sharing plans and endowment accounts. The Fund had no interest in and received no benefit from the operation of Dreyfus Marine. See Complaint paragraph 11 (A-9,10).

(c) Defendants Stein, Johnson and Greene, at all relevant times, were the three Investments Officers of the Fund and also were officers and/or directors of the Fund, Dreyfus Corporation and/or Dreyfus Marine. See Complaint paragraphs 12,13 and 15 (A-10).

(i) Stein was Board Chairman of Dreyfus Corporation and Vice-Chairman of Dreyfus Marine. He was also President,

Chairman and one of the three Investment Officers of the Fund . See Complaint paragraph 12 (A-10).

(ii) Johnson was Vice-President of Dreyfus Corporation and President and a Director of Dreyfus Marine. He was also Vice-Chairman, a Director and one of the three Investment Officers of the Fund. See Complaint paragraph 13 (A-10).

(iii) Greene was Vice-President, General Counsel and a Director of Dreyfus Corporation. He was also Secretary, Treasurer, and the third of the three Investment Officers of the Fund. See Complaint paragraph 15 (A-10).

(d) Defendant Smerling was Vice-President of Dreyfus Corporation and also was Vice-President (Financial) of the Fund. See Complaint paragraph 14 (A-10).

(e) Defendant International Telephone and

Telegraph Corp. ("I.T.T.") is a Delaware corporation with its principal office in the City of New York. The nature of the activities engaged in by this defendant are predescribed in the Complaint and are illustrated, infra. See Complaint paragraph 8 (A-9).

(f) Defendant Lazard Freres & Co. ("Lazard Freres") is a partnership engaged in the investment banking business with its principal office in the City of New York. Since 1965 this defendant has earned in excess of $6,500,000. in fees and commissions for services performed for I.T.T. The nature of its participation in the course of conduct complained of herein is described in the Complaint and is illustrated infra. See Complaint paragraph 9 (A-9).

(g) Defendants Andre Meyer ("Meyer") and Felix G. Rohatyn ("Rohatyn") are partners in

Lazard Freres. Rohatyn is also a Director of I.T.T. and Meyer acted as investment banker for I.T.T. in the acquisition of the Hartford Fire Insurance Co. The nature of the activities of these defendants respecting the course of conduct complained of herein is described in the Complaint and is illustrated infra. See Complaint paragraphs 17 and 18 (A-11).

(h) From and after August 1970 defendants Marine Midland and Dreyfus Corporation participated in the management of and had a direct interest in the success of defendant Dreyfus Marine. During this period Dreyfus Corporation, its officers and directors, with the knowledge, consent, cooperation and assistance of defendants Marine Midland, I.T.T., Lazard Freres, Rohatyn and Meyer engaged in seeking business opportunities for the benefit of defendant Dreyfus Marine. See Complaint

paragraph 19 (A-11).

(i) The conduct of the defendants, other than the Fund, deprived the Fund, during the period from 1969 to 1971, of the dedicated, competent and honest assistance of its officers and directors and of its investment manager and advisor. This occurred during a period when such assistance was most keenly needed as the net asset value of the Fund declined some $434,700,000. These losses were due in substantial part to the failure of Dreyfus Corporation, Stein, Johnson, Smerling and Greene to properly perform their fiduciary obligations to Dreyfus Fund and the cooperation of the other defendants (other than the Fund) with them in accomplishing such fiduciary breaches. See Complaint paragraph 22 (A-15). (These losses are not merely attributable to the general decline in the prices of securities during this

period. In addition to the drop in net asset value, in dollar amount, the Fund's performance in comparison the other mutual funds with which it competes, declined from its previously superior position to that of mediocre or poor performance).

(j) The conduct of the defendants, other than the Fund, deprived the Fund of the guidance, uninfluenced by motives of personal gain, which it should have received from Dreyfus Corporation and the defendants Stein, Johnson, Smerling and Greene. See Complaint paragraph 24 (A-15,16).

(k) In so acting, the defendants, other than the Fund, through a common plan and understanding among them, brought about the diversion and channeling of profits, earnings and assets from the Fund to Dreyfus Marine resulting in an improper gain and enrichment by Dreyfus Marine in

the form of alleged renumeration for the management of over $200, 000,000 in assets. See Complaint paragraph 25 (A-16).

(l) The defendants Dreyfus Marine, Dreyfus Corporation, Marine Midland, Stein, Johnson, Smerling and Greene benefited from the diversion and channeling of profits, earnings and assets from the Fund and are liable and accountable to the Fund for their resulting gains and profits and for the damages sustained by the Fund due to their conduct. See Complaint paragraph 26 (A-16).

(m) The improper course of conduct resulting in the above described self-dealing was not disclosed to the shareholders of the Fund. By reason of such misconduct and such nondisclosure, the annual approval by the Fund's shareholders of the investment management and advisory agreements between the Fund and Dreyfus Corp. and

its subsidiaries, officers, directors, agents and/or employees for the years 1969 through 1971 was induced and obtained by fraud and was void and of no effect. The defendants, other than the Fund, are liable to the Fund for assets and funds expended by the Fund as the consequence of these agreements. See Complaint paragraph 28 (A-17).

(n) The defendants Dreyfus Corporation, Stein, Johnson, Smerling and Greene, by reason of their misuse of their positions of trust as fiduciaries of the Fund, and the breach of their duties and obligations to the Fund are liable to the Fund for the return of all charges, fees, salaries, commissions, and other compensation or consideration paid by the Fund to each and every one of them and/or to any entity controlled or owned in whole or in part by any of them during the years 1969

through 1971. See Complaint paragraph 27 (A-16,17).

The Complaint, thus, sets forth in considerable detail a course of conduct engaged in by the defendant Dreyfus Corporation and certain of its officers, in cooperation with the other defendants, other then the Fund, whereby they utilized the assets and purchasing power of Dreyfus Fund for their personal enrichment without obtaining the permission of the Fund or of its shareholders and without disclosing their activities to the shareholders of the Fund. To illustrate the manner in which this scheme worked the Complaint, at paragraph 21, spelled out, in evidentiary detail, a specific, typical transaction. The pleaded details are as follows:

> "21. A part of the said wrongs involved the utilization by Dreyfus Corporation of its position as investment manager and investment adviser of Dreyfus Fund, to obtain for Dreyfus Marine the management of a pension fund controlled by I.T.T., under the following circumstances:

"(a) In late 1969, I.T.T. was seeking to merge with Hartford and, so as to obtain a ruling from the Internal Revenue Service that such a merger would be a tax-free transaction for Hartford shareholders, I.T.T. agreed to dispose unconditionally of 1.7 million Hartford shares which it held;

(b) In November 1969, a sale by I.T.T. of said 1.7 million shares was arranged through Lazard Freres to Mediobanca, a banking firm in Milan, Italy. The sale agreement provided that I.T.T. would bear the risk of any loss sustained by Mediobanca and further that Mediobanca would realize a profit on resale within a stated period of time;

(c) Defendants Rohatyn and Meyer had been involved in negotiations for I.T.T. to effect the merger with Hartford and were instrumental in arranging the sale to Mediobanca;

(d) Between November 1969 and late 1970, Mediobanca exchanged the aforementioned shares of Hartford for shares of I.T.T. and, again acting in concert with Lazard Freres, sold all or a portion of the latter shares to Dreyfus Fund, thereby relieving I.T.T. of its aforementioned contractual obligations to Mediobanca;

(e) On or about July 17, 1971, terms under which the United States Government was willing to settle litigation it has instituted challenging the merger of I.T.T. and Hartford, were privately revealed to officials of I.T.T. and of Lazard Freres. These terms were revealed to the public on or about July 31, 1971;

(f) Between August 1970 and July 1971, defendants Dreyfus Marine, Dreyfus Corp., Stein, Johnson, Smerling and Greene were engaged in seeking business opportunities for Dreyfus Marine and among the business

opportunities which they pursued was the management of pension funds controlled by I.T.T.;

(g) To promote this business opportunity for Dreyfus Marine, Dreyfus Corp. and the defendants Stein, Johnson, Smerling and Greene caused Dreyfus Fund to make the purchase of shares referred to in paragraph 21(d), supra, and that purchase did induce I.T.T. to award to Dreyfus Marine the management of pension funds aggregating approximately $10,000,000.;

(h) Defendants Dreyfus Marine, Marine Midland, I.T.T., Lazard Freres, Rohatyn and Meyer knew or should have known of the fiduciary relationship between Dreyfus Fund and the defendants Dreyfus Corp., Stein, Johnson, Smerling and Greene which prohibits self-dealing by them at the expense of and cost or loss to Dreyfus Fund. (A-13,14).

Since I.T.T. and others were willing to confer

extra consideration upon those who controlled the purchasing power of the Fund there was a breach of duty owed by Dreyfus Corporation, Stein, Johnson, Smerling, and Greene to the Fund by causing and permitting the value of such extra realizable consideration to be diverted and channeled to Dreyfus Marine for the enrichment of Dreyfus Marine, Dreyfus Corp., Midland Marine and the individual defendants other than Rohatyn and Meyer. See Complaint paragraph 23 (A-15). The defendants by reason of their cooperation and participation in such breach of fiduciary duties owed to the Fund share responsibility and liability, to the Fund, for the damages which it sustained due to such transactions during the years 1969 through 1971. See Complaint paragraph 29 (A-18).

As a remedy, the complaint seeks an accounting, damages, recission of the Fund's management and advisory agreements with Dreyfus Corporation and reasonable costs and expenses (A-19-20).

INVESTIGATORY PREPARATION FOR THE COMPLAINT

Plaintiff and his counsel first became aware of the possibility that the Fund management had engaged in misconduct due to newspaper reports which dealt only with the I.T.T. - Mediobanca transaction. (A-42). In particular, news items appeared in the New York Times on March 6, April 4 and April 9, 1972. As a result, plaintiff's counsel personally investigated. Reference to this investigation is found in the Record (A-42, 69, 70). The investigation resulted in a visit to plaintiff's counsel office by an individual in a particularly strong position to know what had occurred and who insisted upon anonymity. This individual brought documents to support the charge that the course of conduct complained of in this complaint had commenced in 1969, and was still continuing when the investigation was conducted. This course of conduct did not merely involve one transaction with I.T.T. Rather, it involved a continuing pattern of such transactions which were similar to one another, in that, in each, the buying power of the Fund was utilized to obtain consideration which did not enure to the benefit of the Fund but, rather, enriched its fiduciaries. (A-69, 70).

The need for secrecy was obvious because revelation of the informant's identity and of his role in this investigation would destroy his career. The informant further insisted that the particular documents furnished be kept confidential because routing instructions on those documents, which designate the parties to whom they were directed, in many instances could lead to a reconstruction and examination of the hands through which they had passed and this, in turn, might lead to identification of individuals as informants. This latter point was considered the more vital because, in addition to leading to identification of the correct party, such a reconstruction and examination might well result in false accusations addressed to perfectly uninvolved people. (A-70).

Consequently, counsel was compelled to draw a complaint with all of the particularity possible, within the confines of the above described restrictions. In doing so, it was expected that through reasonable and expeditious discovery the defendants could be caused to deliver the same information as had been provided by the confidential informant. (A-70). Furthermore, any additional evidentiary details which had not been revealed by the informant and, which by their nature, were controlled by and in the possession of various defendants would also be obtainable in the course of such discovery. (A-70). This procedure was

considered by plaintiff's counsel to be an acceptable method for securing the evidentiary details to support the already particularized allegations in the complaint and also to protect the identity of the confidential informant and other aspects of counsel's work-product. (A-70). For this purpose, interrogatories and a demand for the production of documents were prepared and served. (A-14, 94-148). These interrogatories and this document-production demand were somewhat extensive and they demonstrate, it is submitted, the wealth of evidentiary detail which plaintiff's counsel knew existed and wished to obtain in this manner.

DEFENDANTS' FIRST MOTION - SEEKING DISMISSAL OR A MORE DEFINITE STATEMENT ON THE BASIS OF A CLAIM THAT THE COMPLAINT FAILED TO COMPLY WITH RULE 9(b) F. R. Civ. P.

By Notice of Motion dated November 15, 1972, the defendants, Dreyfus Corporation, Stein, Johnson, Smerling & Greene moved for dismissal of the amended complaint or, alternatively, an order directing the filing of a more definite statement, on the ground of plaintiff's alleged failure to comply with the provisions of Rule 9(b) F. R. Civ. P. (A-22, 23). Other defendants quickly joined in the motion.

This motion is supported by an affidavit of the defendant, Greene, sworn to November 14, 1972 (hereinafter

"Greene Affidavit No. 1") which clearly establishes that the defendants view Rule 9(b) as requiring presentation, in the complaint, not merely of the ultimate facts respecting the fraudulent course of conduct, but also minute evidentiary details and transactional data throughout that course of conduct. (A-24-28). The particularization which was in the complaint, and which is described above, is ignored by Mr. Greene, or caricatured as "the most sweeping and general conclusory allegations of fraud". (A-24). He cites several examples - all of them contained in one single paragraph of the complaint. (A-25). He claims the complaint is "long on invective" but "singularly short of factual allegations", although he does concede the existence of the description in Paragraph "21" of the complaint of the I.T.T.-Mediobanca transaction - an episode which he regards as an instance of "alleged wrong-doing". (A-25).

Significantly, in the course of all this characterization, Greene Affidavit No. 1 never once mentions the actual nature of the complaint. It fails to state that the complaint alleges, quite clearly, that defendants acted in concert during a stated period of time to utilize the purchasing power of the Fund to obtain business advantages for their own enrichment and that this course of conduct was in violation of the duties

owed by defendant Dreyfus Corporation and its officers to the Fund. It also fails to mention that the complaint charges explicitly that this course of conduct and the related breach of fiduciary obligation were not disclosed in the proxy statements issued to Dreyfus Fund shareholders for the purpose of obtaining their approval of the continued employment of Dreyfus Corporation as investment manager and adviser. In short then, Greene Affidavit No. 1, by selecting particular words and phrases from the complaint and by omitting any description of inconvenient portions seeks to paint a picture of a pleading that alleges no ultimate facts but merely contains general conclusions.

Equally significant is the failure to claim any inability to answer the complaint. There is no claim that any of the defendants would have the slightest difficulty in framing an answer in which they would either admit or deny the existence of and their participation in the course of conduct alleged in the complaint, the failure to disclose the same in proxy statements, and the other facts which are alleged in the complaint. Instead, this affidavit merely claims that it is unfair for plaintiff not to tell all in the complaint (thereby, presumably requiring plaintiff to demonstrate the absence of any need to engage in discovery). (A-26).

Particularly inappropriate is the reference, in Paragraph "8" of this affidavit, to a partial and uncompleted deposition which some of the defendants took of the plaintiff. (A-26, 27). During this deposition a dispute arose between counsel respecting the propriety of questions which sought to explore counsel's work-product and which sought revelation of the identity of confidential informants. We were in disagreement on these questions and the remedy was obvious - if the defendants believed that the position of plaintiff's counsel was wrong, they were free to ask the District Court for rulings.

They chose not to do so. Instead, they waited until after the record was certified to this Court on appeal and then arranged to add the unsigned, partial deposition to the record and had it transmitted for consideration by this Court. It is useful to note that at the time that Greene Affidavit No. 1 was filed, the transcript of the said partial deposition was not on file in the District Court and was not filed there until approximately one year later. (A-2-6). Obviously, then, the partial deposition had nothing to do with the Orders now being appealed.

Finally, Mr. Greene refers to the decision in Segal v. Gordon, et al. (2 Cir. 1972) 467 Fed 2d 602. (A-27).

This case will be discussed later in this brief.

In response plaintiff filed the affidavit of Dermot G. Foley, sworn to December 14, 1972 and the Exhibits attached thereto (hereinafter "Foley Affidavit No. 1"). (A-29-62). In this affidavit, plaintiff agrees with defendants that the Rule 9(b) does apply to the allegations of fraud contained in Paragraph "20" of the amended complaint. (A-31). Plaintiff disagrees, however, with defendants' claim that, as to those allegations, there was a failure in the complaint to particularize as required by that rule. (A-31). In Foley Affidavit No. 1 a distinction was drawn between three categories of allegations: conclusory charges; allegations of ultimate facts; and allegations of evidentiary fact. (A-31). Plaintiff's position, then as now, was that conclusory charges, such as those in Paragraph "20" of the complaint, must be supported by allegations of ultimate fact but need not be further supported by all of the evidentiary details which, indeed, are frowned upon in a pleading and the inclusion of which may violate Rule 8. (A-31). Foley Affidavit No. 1 itemizes and analyzes the conclusory charges of fraud set forth in the complaint, the pleaded allegations of ultimate fact supporting those conclusory charges and the evidentary facts which were pleaded to illustrate the allegations of ultimate fact. (A-32-38).

Defendants' claim that the complaint lacks description of the basis for belief in the truth of facts alleged upon information and belief, is countered in Foley Affidavit No. 1 by showing where and how that basis was, in fact, set forth in the complaint. (A-38-41, 44).

In response to the allegations in Greene Affidavit No. 1, which referred to the partial and uncompleted deposition of the plaintiff, Foley Affidavit No. 1 describes the work-product problem and the difficulties respecting the protection of confidential sources of information. (A-41-43). These have been discussed above.

Finally, there is discussion in Foley Affidavit No. 1 of Segal v. Gordon, et al., supra, to which reference was made in Greene Affidavit No. 1. (A-43,44). Since, in every motion based on Rule 9(b), reference must be made to the challenged complaint, the complaints in the present case and in the Segal case were set forth in full, for comparison. (A-46-62). If the Segal case has any relevance to this case, then the present complaint must be shown to suffer from the same deficiencies as the Segal complaint (See Exhibits "A" & "B" attached to the Foley Affidavit No. 1). (A-46-62). The difference between these two complaints is obvious, from such

a comparison. (A-43, 44, 46-62). The Segal complaint was limited to 1-1/2 pages of unsupported conclusory charges of fraud and the request for damages in excess of $5 million dollars plus other relief. (A-44, 61, 62). Judge Moore's opinion in Segal . Gordon demonstrates obvious and well-earned irritation at that complaint. By contrast, the complaint in the present case is some 14 pages in length and is well-supported, with allegations of ultimate, and even to some extent, of evidentiary fact. (A-44, 46-60). It is submitted that an examination of these two complaints will demonstrate the absence of Segal-type defects from the present pleading. (A-43).

The essential difference, then, between the parties on this motion was that the defendants claim that in alleging a fraudulent course of conduct, each individual transaction and event which occurred during that course of conduct must be pleaded in the complaint in full evidentiary detail at least equal to the particularization of ITT-Mediobanca illustration. Plaintiff's position is the conclusions of fraud must be supported by allegations of ultimate fact only and that each and every minute evidentiary detail need not be set forth in the complaint.

Judge Cannella decided in favor of defendants in an opinion filed on May 11, 1973 in which he denied the motion to dismiss but directed the filing of a more definite statement. (A-63-65). Plaintiff has appealed from this result. (A-93).

PLAINTIFF'S MOTION FOR DISCOVERY TO FRAME A MORE DEFINITE STATEMENT AND DEFENDANTS' CROSS-MOTION FOR DISMISSAL FOR FAILURE TO FILE A MORE DEFINITE STATEMENT

Two problems arise from the District Court's memorandum decision filed May 11, 1973. (A-68-71). First, Judge Cannella regarded the allegations in Paragraph "21" of the complaint (the ITT-Mediobanca transaction) as the only allegations constituting particularization to comply with Rule 9(b). It will be recalled that the conclusory charges which defendants objected to are contained in Paragraph "20" of the complaint. As indicated above, allegations of ultimate fact in support of these conclusions are not merely found in Paragraph "21" but throughout the complaint. In comparing only the allegations in Paragraph "21" with the requirements of Rule 9(b) to determine whether the requirements of that rule had been met, and in declining to consider the

allegations of ultimate fact found elsewhere in the complaint, Judge Cannella was indicating an interpretation of Rule 9(b) which requires not only merely allegations of ultimate fact but minute, detailed, evidentiary pleading. As indicated above, this is the position that the defendants had taken also.

The second problem arose with respect to the manner in which a more definite statement could be drafted which would not expose confidentially obtained information capable of revealing the identity of an informant. This would arise because a more definite statement must contain information relevant to the documents and other evidence that had been furnished to plaintiff's counsel in the course of his investigation and will generate discovery of counsel's work-product. (A-69-70). A related difficulty concerned those details of information of which plaintiff's counsel knew in a general way, but as to which he lacks some specifics. (A-70). These items of information are exclusively controlled by defendants, and, in the view of Judge Cannella, as expressed in his opinion filed May 11, 1973, it was essential that they be included in minute detail in the complaint to satisfy Rule 9(b).

Thus, it was necessary to find a way to marshal this information without risking the exposure of confidential informants. Plaintiff's position clearly was analagous to that of one in need of discovery to frame a complaint. Essential information which was known to exist could not be obtained except by discovery to frame the more definite statement.

The effort to obtain such discovery was initiated by a Notice of Motion on September 12, 1973 seeking an order permitting the plaintiff to take discovery of defendants for the purpose of framing a more definite statement. (A-66, 67). A supporting affidavit of Dermot G. Foley sworn to September 12, 1973 (hereinafter "Foley Affidavit No. 2") set forth the need for such discovery. (A-68-71). In particular, the pre-complaint investigation of plaintiff's counsel was discussed and problems of the confidential informant and of the unavailability of some details within defendants' control, are reviewed. (A-69, 70). Consequently, this Motion was not an effort to discover fraud but merely an effort to fill in the minute details of a fraudulent cause of conduct which was already known to exist. (A-70).

By Notice of Cross-Motion dated November 9, 1973, the defendants, Dreyfus Corp., Stein, Johnson, Smerling and Greene sought dismissal of the complaint on the ground that the more definite statement, previously ordered by Judge Cannella, had not been filed. (A-72, 73). Other defendants quickly joined in this cross-motion. The relevant facts cited in the affidavit of defendant, Greene, supporting the cross-motion, report that the more definite statement had not been filed and claimed that plaintiff sought discovery merely to perpetrate vague charges of fraud in the complaint subjecting the defendants to "expensive, tiresome, burdensome and time-consuming discovery." (A-74-79). Supporting memoranda filed by defendants, while more vigorous than Mr. Greene's affidavit, followed the same line.

A reply affidavit of Dermot G. Foley, sworn to October 16, 1973, was designed to meet several arguments raised by defendants. (A-82-89). Among them was the charge that plaintiff was really unwilling to be specific about the fraud. In response, it was pointed out that there are unique conditions in this case which justified discovery before the filing of a more definite statement. The purpose of such discovery was to

facilitate the filing of the very statement which the defendants claimed plaintiff was unwilling to furnish. (A-84). It was further pointed out that the minute transactional details which the defendants had claimed, with apparent success, are required to be pleaded in the complaint, are largely within the knowledge of the defendants. (A-85). The extent and nature of the knowledge of plaintiff's counsel on these matters and the unnecessary problems which exposure of work-product would create, were explained. (A-85).

Defendants' effort to compare the present complaint with that in Segal v. Gordon, supra, was again countered. (A-85-87). The court was again invited to compare the complaints and their differences were against discussed.

Mischaracterizations of plaintiff's case by defendants created problems which were addressed in this affidavit. For instance, the charge that the present case, like Segal v. Gordon, had been triggered by newspaper reports was rebutted and reference was again made to the extensive pre-complaint investigation conducted by plaintiff's counsel and to the materials which that investigation contributed to the complaint beyond any-

thing referred to in newspaper reports. (A-86, 87). Emotional outbursts respecting "fishing expeditions", "horrendous" interrogatories, "frivolous" positions adopted by plaintiff and so on, are discussed briefly to show their unreality. (A-82, 87).

Also discussed and opposed in this affidavit is defendants' cross-motion for dismissal of the complaint with prejudice. (A-88).

The decision of Judge Cannella on these motions was filed October 25, 1973. (A-90, 91). In this memorandum decision, Judge Cannella held that to grant the requested discovery to frame more definite statement would be violative of Rule 9(b) and the spirit of Segal v. Gordon, supra, and denied the motion for such discovery. Respecting defendants' cross-motion, the court granted the motion to strike the complaint and dismiss the action, but without prejudice. Plaintiff has appealed from this result. (A-93).

POINT I

THE COMPLAINT HEREIN COMPLIES WITH THE REQUIREMENTS OF RULE 9(b) F. R. CIV. P.

It is elementary and obvious that Rule 9(b) F. R. Civ. P. was not created to furnish de facto amnesty to corporate wrongdoers.

The Rule can only be understood in terms of what it is intended to accomplish and how this end has been pursued by the Courts.

In this context, three fundamental concepts have emerged which are the standards or criteria by which this Rule is applied:

1. Conclusory charges in a pleading of fraud must be supported by allegations of ultimate fact which demonstrate the circumstances constituting fraud, but need not be supported by allegations of evidentiary fact. Where the charges are made on information and belief, the Rule is satisfied by stating the basis for belief in their truth.

2. The particularization requirement of Rule 9(b) must be balanced with the provisions of Rule 8(a) and (e)(1).

3. A complaint fails the test of particularization if the Court finds that, due to vagueness,

the defendants cannot respond to it.

The present Complaint satisfies each of these criteria comfortably.

A. THE COMPLAINT DOES PARTICULARIZE CONCLUSORY CHARGES BY ALLEGATIONS OF ULTIMATE FACT.

Rule 9(b), F. R. Civ. P. requires that in all averments of fraud, "the circumstances constituting fraud - - - shall be stated with particularity." This requirement, however, does not abrogate Rule 8, F. R. Civ. P. and it must be harmonized with the directives in subdivisions (a) and (e) of Rule 8 that the pleadings should contain a "short and plain statement of the claim" and that each averment should be "simple, concise and direct."

Consequently, it has been repeatedly held that Rule 9(b) requires only the pleading of ultimate facts and does not require the pleading of evidentiary facts. See, In re Tucker Corp., (7 Cir., 1958) 256 F.2d 808, 811; Textile Banking Co. v. S. Starensier, Inc., (D.C., Mass., 1965) 38 FRD 492, 493; Loews, Inc. v. Makinson, (N.D. Ohio, 1950) 10 FRD 36, 37; C.I.T. Financial Corp. v. Sachs, (S.D. N.Y., 1950) 10 FRD 397, 398; Perrott v. U.S. Banking Corp., (D.C., Del., 1944) 53 F. Supp. 953, 957.

Ultimate facts which are to be pleaded in a complaint are the issuable, constitutive or traversable facts essential to the statement of a cause of action. Hickey v. Ritz-Carlton Restaurant & Hotel Co. of Atlantic City, (3 Cir., 1938) 96 F.2d 748, 750. They are the final or resultant facts that have been reached, by the process of logical reasoning, from the detailed or probative facts. Oliver v. Coffman, 45 N.E.2d 351, 112 Ind. App. 507. They are conclusions from reflection and reasoning on evidentiary facts. Bjelka v. M. & Z. Mizeson Realty Co., 260 N.Y.S. 473, 146 Misc. 1; Rhode v. Bartholomew, 210 P.2d 768, 94 Cal. App. 2d 272. They are the facts which the evidence on the trial will prove and not the evidence which will be required to prove the existence of those facts. Long v. Love, 53 S.E.2d 661, 230 N.C. 535; Foster v. Holt, 75 S.E.2d 319, 237 N.C. 495; Flack - Beaue Lumber Co. v. Bass, 62 So.2d 235, 258 Ala. 225; First v. U.S. 5 & 10 Cent Stores, Inc., 138 S.E.2d 186, 110 Ga. App. 237.

Evidentiary facts, on the other hand, are those matters of evidence which are required to prove the ultimate facts. Johnson v. Inter-Southern Life Ins. Co., 50 S.W.2d 16, 244 Ky. 83; Wilson v. Haughton, (Ky.) 266 S.W.2d 115, 41 ALR 2d 950; Gerwin v. American News Co., 270 S.W.2d 354, 356, 197 Tenn. 51. They are facts from

which the ultimate and decisive facts may be inferred. Long v. Love, supra; Foster v. Holt, supra.

The ultimate facts, whose pleading is required under Rule 9(b) F. R. Civ. P., are only those which are necessary to appraise the adversary as to what is relied upon as constituting fraud. N.Y., N.H. & H. Railroad v. New England Forwarding Co., (D.C., R.I., 1953) 119 F. Supp. 380, 382; U.S. v. Gill, (W.D. Pa., 1957) 156 F. Supp. 955, 957. They must give notice of the nature and basis of the claim asserted sufficient to enable the defendants to frame a responsive pleading. Paramount Film Distrib. Co. v. Jaffurs, (W.D. Pa., 1951) 11 F.R.D. 437, 438; Scervini v. Miles Laboratories, Inc., (S.D. N.Y., 1951), 11 FRD 542, 543. But they are only the ultimate facts which, if proven by evidentiary facts, would constitute fraud or would lead clearly to the conclusion that fraud had been committed. Chicago Title & Trust Co. v. Fox Theatres Corp., (S.D. N.Y., 1960) 182 F. Supp. 18, 31; Barnes v. Boyd (S.D. W. Va., 1934) 8 F. Supp. 584, 592.

The Complaint herein had met the requirements of Rule 9(b). All parties agree that the conclusory charges of fraud to which the Rule is applicable are those contained in paragraph "20" of the Complaint. (A-24, 25, 30.)

Paragraph "20" of the Complaint states, substantially in statutory, conclusory language, that the defendants, other than the Fund, during the years 1969 to 1972, engaged in five categories of activity which, as to the Fund, were fraudulent, deceptive and/or manipulative. (A-32, 33.)

In paragraphs "22" through "28" of the Complaint, there is an itemization of the ultimate facts which constituted the said fraudulent, deceptive and manipulative activities. These ultimate facts are summarized in paragraph "10" of the Affidavit of Dermot G. Foley, sworn to December 14, 1972. (A-33 - 35.) It cannot be seriously doubted that, if these ultimate facts are established on trial by the introduction of evidentiary facts, they will prove that the Fund was victimized by the fraudulent, deceptive and manipulative activities with which the defendants are charged in the conclusory statements of paragraph "20" of the Complaint. There are certain obvious facts which are not open to honest dispute and this is one such fact.

Consequently, the ultimate facts establishing the circumstances of the fraud have been pleaded in the Complaint and the requirements of Rule 9(b) F. R. Civ. P. have been satisfied.

In addition to the foregoing facts, the Complaint

contains additional factual allegations, of an evidentiary nature, which establish that defendant officers of the Fund occupied positions in DREYFUS CORPORATION and in DREYFUS MARINE which conflicted with their duties of selfless fidelity to the Fund and which enabled them to engage in a flagrant and outrageous fraud upon the Fund, the details of which are related in paragraph "21" of the Complaint. (A-8 - 14, 35 - 40.)

This conflict of interest was a source of the breach of fiduciary duties complained of while the details of the said fraud illustrate the pattern of conduct involved in this case. When considered together with the allegations of ultimate fact discussed supra, they clearly demonstrate the circumstances of the fraud with which the defendants, other than the Fund, are charged in the conclusory statements of paragraph "20" of the Complaint.

B. THE REQUIREMENTS OF RULE 9(b) F. R. CIV. P. ARE SATISFIED BY THE INCLUSION IN THE COMPLAINT OF ALLEGATIONS WHICH SHOW THE BASIS FOR THE BELIEF IN THE CONCLUSORY CHARGES OF FRAUD WHICH ARE PLEADED ON INFORMATION AND BELIEF.

A complaint which is pleaded on information and belief satisfies the requirements of Rule 9(b) F. R. Civ. P. if it includes a showing of the basis upon

which such belief is founded. Duane v. Altenburg, (7 Cir., 1962) 297 F.2d 515, 518. This relaxation of the Rule is made in such cases as to matters peculiarly within the knowledge of the adverse party. Such pleading is frequently utilized in fraud actions and it has been in the Complaint herein.

The Complaint is verified, as is required in all derivative actions. (A-60.) The said verification, which is part of the Complaint, unequivocally states that the grounds for deponent's belief as to all matters pleaded on information and belief are the documents and records and conversations had with various persons.

In addition, the Complaint contains the extensive allegations of fact discussed supra which completely justify a belief in the conclusory charges of fraud to which Rule 9(b) F. R. Civ. P. applies.

As has been shown, supra, Rule 9(b) F. R. Civ. P. is satisfied by allegations of ultimate fact respecting the circumstances of the conclusory charges of fraud. Surely, in the instance of pleadings on information and belief, where the requirements of the Rule are relaxed because of control of the facts by the adversary, there could not be a heavier burden to satisfy respecting pleadings which show the basis for belief. Obviously not. Rule 8,F. R. Civ. P. still militates against the

requirement of pleading evidentiary facts in a complaint.

Thus, the allegations of fact, discussed supra, demonstrate the basis for the belief in the charges in paragraph "20" of the complaint. When, to this there is added the express statement of grounds for such belief in the verification, it becomes apparent that the basis for belief in allegations made on information and belief, has been fully set forth in the complaint.

C. THE PARTICULARIZATION REQUIREMENT OF RULE 9(b) F. R. CIV. P. DOES NOT ABROGATE RULE 8(a) AND (e)(1)

Rule 8(a) requires that a claim be presented in a "short and plain statement". Rule 8(e)(1) demands that each averment of a pleading be"simple, concise, and direct". These provisions are not abrogated by the particularization requirement of Rule 9(b). The two rules must be read together. Consequently, the particulars required by Rule 9(b) merely must suffice to generally describe the circumstances of the fraud in enough detail to enable a defendant to frame a response. C.I.T. Financial Corp. v. Sachs (S.D.N.Y., 1950) 10 FRD 397; N.Y., N.Y. & H. Ry. v. New England Forewarding Co. (D.C.,R.I., 1953) 119 F. Supp. 380; U.S. v. Gill (W.D., Pa., 1957) 156 F. Supp. 955. It is particularly significant that no defendant has ever claimed difficulty in framing an answer to the complaint in the present action. A reading of

the complaint would demolish any such claim and would demonstrate the ease with which the allegations could be understood and answered.

The accomodation of Rules 8 and 9 to one another precludes the minutely detailed particularization which the defendants sought in the complaint. If such particularization were required the notice pleading concept of Rule 8 would be demolished in all complaints respecting a wrongful course of conduct. It will be recalled that the defendants, and Judge Cannella, considered only the allegations of paragraph "21" of the complaint, to be adequately particularized. (A-25, 64). If this much detail were required of each and every event or transaction involved in a wrongful course of conduct, most such pleadings would be unmanagable in terms of pure bulk. It is an unnecessary and an impossible burden to place on any such complaint.

Of course, in practice these dictates of logic have been followed. With regularity complaints are filed which allege that the defendants engaged in frauds and which then proceed to particularize with a general description of the circumstances constituting fraud but without minute details. To illustrate, there is attached, as an addendum to this brief, a copy of the complaint filed in the Southern District of New York by the Securities and Exchange Commission against Occidental Petroleum Corporation and Armand Hammer on March 4, 1971 (71 Civ. 982).

An examination of that complaint will reveal a familiar pattern. The defendants are accused of fraud (paragraphs 8, 26 and 30). This charge is particularized by allegations that from 1966 to 1971 the defendants engaged in a course of conduct wherein "among other things" they improperly recognized profits and exaggerated the earnings of the corporate defendant (paragraph 8). Then examples are given covering the period from June 1969 through June 1970. These examples are presented merely as "a part of said scheme, artifice and fraudulent course of business" (paragraphs 9, 27 and 31). The balance of the period involved is not discussed in this complaint.

This is a familiar pattern in such pleadings and, we submit, it would be less than sensible to require detailed recitation in the complaint of each and every event and transaction which occurred during the subject course of conduct. But we are appealing from Orders which require such particularization.

POINT II

RELIANCE UPON THE SEGAL CASE IS MISPLACED - IT IS INAPPOSITE

The defendants,and Judge Cannella,rely heavily upon the decision of this Court in Segal v. Gordon, et al (1972) 467 Fed. 2d 602. That decision must be read in the context of the complaint to which it is addressed. A copy of the Segal complaint is included in the Appendix (A-61, 62). For comparison purposes the complaint in the present case is also in the Appendix (A-46-60).

The Segal complaint is one and one-half (1 1/2) pages in length and is clearly devoid of the allegations of ultimate fact required by Rule 9(b) F.R.C.P. It contains nothing comparable to the factual allegations which amplify the conclusory charges of fraud in the complaint now under attack before the Court.

Therefore, because the pleading deficiencies found in the Segal case do not exist in the complaint now before this Court, the Segal decision is simply not in point. A comparison of the two complaints, we submit, should dispose of the question.

In addition to the beneficial effects which such a comparison would produce, the opinion of this Court in Segal v. Gordon, supra, indicates several decisive areas which distinguish the present case.

Segal was a 10-b case. The present case is derivative. Judge Moore distinguished such cases from derivative and informer's cases in terms of the applicability of Rule 9(b). Quoting from Professors Wright and Miller he observed "....Thus, simple allegations should suffice for claims of fraud in an informer's action or a derivative suit and primary reliance should be placed on the discovery process for uncovering factual details...." 467 F.2d at page 607.

In Segal the complaint confirmed that the plaintiff knew of no fraud. 467 F.2d at pages 607-8. We have demonstrated very substantial knowledge of the fraud of which we complain but need discovery to uncover factual details.

In Segal there was little or no pre-complaint investigation. 467 F.2d at page 608. We have described our extensive investigation and its results.

In Segal the complaint was limited to one and one-half (1 1/2) pages of pure conclusions. Our fourteen-page complaint pleads extensive allegations of ultimate and even some evidentiary fact, particularizing the conclusory charges of fraud.

Segal v. Gordon, supra, on its own terms, does not cover the present complaint.

POINT III

IF DETAILED EVIDENTIARY ALLEGATIONS ARE REQUIRED UNDER RULE 9(b), THEN PLAINTIFF SHOULD HAVE BEEN PERMITTED TO DISCOVER THEM BECAUSE MANY SUCH DETAILS ARE CONTROLLED BY DEFENDANTS AND DIRECT UTILIZATION BY PLAINTIFF OF THOSE KNOWN TO HIS ATTORNEY WOULD RESULT IN EXPOSING THE IDENTITY OF AN INFORMANT AND OTHER CONFIDENTIAL WORK-PRODUCT.

In his Memorandum-Decision filed May 11, 1973 Judge Cannella clearly called for particularization of all transactions during the subject course of conduct, equal in minute detail to the description in Paragraph 21 of the complaint respecting the I.T.T.-Mediobanca transaction. (A-63-65). This occurred despite the failure of any defendant to indicate or claim that he or it had the slightest difficulty responding to the complaint. This called for pleading of evidentiary details and was clearly error. Re v. Fullop (E.D., Ill., 1958) 22 F.R.D. 52, 55; Kuenzell v. U.S. (N.D., Cal., 1957) 20 F.R.D. 96, 98; Bell v. Novick Transfer Co. (D.C., Md., 1955) 17 F.R.D. 279, 280, 281; Boerstler v. Amer. Med. Assoc. (N.D., Ill., 1954) 16 F.R.D. 437, 446, 447.

However, once Judge Cannella had done this the plaintiff had no option but to live with the decision and try to comply with it. Thus, plaintiff faced the threat of

dismissal unless he was able to provide such evidentiary details in a new pleading. It was impossible to do so for two reasons: 1) many of these details were controlled by the defendants; and 2) direct utilization by the plaintiff of those details known to his attorney would result in exposing the identity of an informant and other confidential work-product.

Thus, Plaintiff's position was essentially that of a person in need of details to frame a complaint. He knew, and had described in terms of ultimate facts the fraud of which he complained but the framing and filing of a pleading in terms of evidentiary details must be delayed until discovery of such details could be obtained.

Were a complaint not already on file Plaintiff could clearly have moved for such discovery under Rule 27 F.R. Civ.P. Moessler v. U.S. (2 Cir., 1946) 158 F.2d 380. However, since a complaint was on file and an action was pending, Rule 26 F. R. Civ. P. was also relevant. Plaintiff's motion, under both of these rules was denied in Judge Cannella's Memorandum-Decision filed October 25, 1973 (A-90-91).

The result presents the plaintiff with a strange and problematical situation. He knows and has pleaded the ultimate facts of the fraud of which he complains. However, he is required to plead evidentiary details. He knows where and how to obtain those evidentiary details by discovery but is unable to plead them without such discovery. His right to such discovery is denied. This essentially unjust interpretation of Rule 9(b) and of discovery procedures is particularly unreal in light of the secrecy which normally surrounds fraudulent conduct and which makes access to minute evidentiary details extraordinarily difficult in virtually every case. The net effect of these rulings places a very high premium and value on this secrecy. It is totally out of line with the established policy in this Circuit of preserving the day in court of a plaintiff who needs evidentiary details exclusively under the control of his opponent, particularly in derivative actions, until such plaintiff has had an opportunity for discovery. Schoembaum v. Firstbrook (2 Cir. 1968) 405, F.2d 215, 218.

POINT IV

THERE IS NO NEED AND NO JUSTIFICATION FOR PLEADING WHICH COULD SUBJECT ATTORNEY'S WORK-PRODUCT TO EXPOSURE OR DISCOVERY.

As has been indicated, the drafting of the Complaint herein was preceded by an extensive and highly confidential investigation by plaintiff's attorneys. That investigation produced information and materials, all of which are in the possession or under the control of the defendants. However, the sources and the extent of the information and materials which plaintiff's attorneys have obtained are confidential and subject to the work-product privilege. No need for their disclosure has been shown, nor has any such need even been claimed.

A requirement to include this purely evidentiary material in a complaint would not only go beyond the pleading requirements of Rule 9(b) F.R.C.P., but could form the basis of discovery efforts on the part of defendants herein seeking access to privileged work-product which would be contrary to the decision of the Supreme Court in Hickman v. Taylor, 329 U.S. 495. (1947)

CONCLUSION

The two decisions of Judge Cannella which are now being appealed interpreted Rule 9(b), F.R. Civ. P. erroneously and should be reversed together with the Judgment of Dismissal.

Respectfully submitted,

KAPLAN, KILSHEIMER & FOLEY
Attorneys for Plaintiff-Appellant
122 East 42nd Street
New York, New York 10017
212-687-1980

Of Counsel:

Dermot G. Foley

ADDENDUM

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAR 21 1977
S.D. of N.Y.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, V. OCCIDENTAL PETROLEUM CORPORATION ARMAND HAMMER Defendants.	COMPLAINT FOR PRELIMINARY AND FINAL INJUNCTION 77 Civil Action No. 982

Plaintiff, the Securities and Exchange Commission ("Commission") alleges that:

1. It appears to the Securities and Exchange Commission, plaintiff herein, that defendants Occidental Petroleum Corporation and Armand Hammer, have engaged, are engaging and are about to engage in acts, practices and a course of business which constitute violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 77j(b), and Rule 10b-5, 17 CFR 240.10b-5 thereunder and plaintiff brings this action to enjoin such acts and practices.

JURISDICTION AND VENUE

2. The Commission is authorized to bring this action under Section 27(a) of the Exchange Act, as amended 15 U.S.C. 78u(e).

3. This Court has jurisdiction of this action pursuant to Section 27 of the Exchange Act, 15 U.S.C. 78aa.

4. Each of the defendants is found in, and/or transacts business in the Southern District of New York. Acts and transactions constituting violations of the Exchange Act as more particularly alleged hereinafter have occurred within the Southern District of New York.

5. Occidental Petroleum Corporation ("Occidental") was incorporated in the State of California in 1920, and maintains its principal office at 10889 Wilshire Boulevard, Los Angeles, California 90024. Occidental also maintains an office at 277 Park Avenue, New York, New York. Occidental has issued and outstanding approximately 53,000,000 shares of common stock registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. 78[illegible] and traded on both the New York Stock Exchange and the Pacific Coast Stock Exchange.

6. Armand Hammer ("Hammer") is Chairman of the Board of Directors, Chief Executive Officer and a Director of Occidental. He maintains an office at 10889 Wilshire Boulevard, Los Angeles, California 90024.

COUNT I

Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b) and Rule 10b-5, 17 CFR 240.10b-5 thereunder

7. Paragraphs 1 through 6 are hereby realleged and incorporated in this count.

8. Since on or about January 1, 1966 to the present, Defendants Occidental and Hammer, directly and indirectly by use of the means and instrumentalities of interstate commerce and the mails, have employed a device, scheme and artifice to defraud, have made untrue statements of material facts and have omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and have engaged in acts, practices and a course of business which operate and would operate as a fraud and deceit upon persons in connection with the purchase and sale of the common stock and other securities of Occidental, in that among other things, Occidental has improperly recognized profits from various transactions and has failed and caused to be issued, to the public and to Occidental shareholders, press releases and reports to shareholders, which press releases and reports [illegible]

overstated the profits earned by Occidental in various reporting periods of Occidental's fiscal years. Said transactions, press releases and reports have occurred in quarters including but not limited to, the quarter ending June 30, 1970, the quarter ending March 31, 1970, the quarter ending December 31, 1969, the quarter ending September 30, 1969, and the quarter ending June 30, 1969. All of which are more fully described below in paragraphs 9 through 23 below.

Quarter Ending June 30, 1970

9. As a part of said scheme, artifice and fraudulent course of business on or about August 16, 1970, Occidental issued a press release and thereafter on or about August 21, 1970, Occidental issued a "Progress Report" to shareholders for the six months ended June 30, 1970, which report was signed by defendant Hammer and mailed to Occidental shareholders. Said press release and "Progress Report" each stated that in the quarter ending June 30, 1970, Occidental's net income was $43,856,000. Occidental further stated that although this amount represented a decline in net income from the second quarter of 1969 "in comparison to the first three months of 1970, second quarter earnings were up $1,486,000 or 3.5% above the first quarter."

10. The press release of August 16, 1970 and the "Progress Report" of August 21, 1970 failed to disclose that the $43,856,000 reported as Occidental's net income for the second quarter included approximately $5,000,000 in purported profits from two sales of land as set forth in paragraphs 11 and 12 below, and approximately $2,000,000 in purported profits from the sale of an interest in certain coal leases, both of which sums were improperly reported as profits. The sale of the interest in the coal leases is more fully described in paragraphs 20 through 20F below.

11. In the first of the two land sales, in the second quarter of 1970, on or about June 13, 1970, Occidental Petroleum Land and Development Corporation ("OPLAD"), a wholly owned subsidiary of Occidental, sold a

property known as the Jenkins Ranch to the Clout Cattle Company, a corporation owned and controlled by one Jack Nutter, for an agreed sales price of $7,600,000. In August 1969, this same property had been appraised at an approximate value of $4,625,000. The agreement between Clout Cattle Company and OPLAD provided that Clout Cattle Company would pay $760,000 to OPLAD, as a cash down payment, and give OPLAD a note secured by the Jenkins Ranch for $6,840,000, for the remainder of the purchase price. The note would bear interest at 10% and no principal payments would be due on the note for three years. In addition, Clout Cattle Company agreed to prepay eighteen months interest, or $1,026,000, and another corporation owned and controlled by Jack Nutter agreed to guarantee another two years of interest payments.

A. Neither Nutter nor Clout Cattle Company had available the funds necessary to pay Occidental the $760,000 cash down payment and the $1,026,000 prepayment of interest to execute the Jenkins Ranch transaction. Therefore, simultaneous with, and as part of, the Jenkins Ranch transaction, OPLAD and Clout Cattle Company executed a transaction which provided Clout Cattle Company with the funds necessary to purchase the Jenkins Ranch. In this transaction, OPLAD purportedly purchased from Clout Cattle Company certain land located in Junction City, Arizona. For this land OPLAD paid $2,600,000 in cash which money was used in part as follows:

$760,000 was used as a down payment on Clout Cattle Company's purchase of the Jenkins Ranch;

$1,026,000 was used as prepayment of interest in connection with the purchase of the Jenkins Ranch;

$100,000 was used to pay a broker in connection with the Jenkins Ranch--Junction City transaction.

OPLAD and Rutter further agreed that Rutter would develop the Junction City property, subdivide it into lots, and sell the individual lots. OPLAD would receive 50% of the profits from the sale of each lot up to $1,000. Any excess profits would be retained by Rutter. In addition, Rutter gave OPLAD the option to demand after three years that Rutter repurchase for cash from OPLAD any lots which remained unsold.

B. In the Jenkins Ranch--Junction City transaction, OPLAD paid out a net of $814,000 and reported an immediate profit of approximately $3,000,000. This purported profit represented the difference between OPLAD's cost basis of $4,600,000 in the Jenkins Ranch and the sales price of $7,600,000 and was computed while wholly ignoring the Junction City transaction through which OPLAD had financed Clout Cattle Company's purchase of the Jenkins Ranch. This $3,000,000 purported profit was included in the $43,856,000 net income reported to the public for the second quarter of 1970. The manner in which this purported profit was earned was never disclosed to the public or to Occidental shareholders, nor has Occidental disclosed that the purported profit was improperly recorded.

12. On or about June 30, 1970, OPLAD executed the second of the two land sale transactions referred to in paragraph 10 above and recorded approximately $2,050,000 as profits in the second quarter of 1970. In this transaction OPLAD sold a property known as the Jones Ranch to Security Alliance Corporation, a corporation wholly owned by Mrs. Alvin Dworman, for a gross sales price of $5,300,000. Mr. Alvin Dworman negotiated the transaction on behalf of his wife's corporation. Security Alliance Corp. made an $800,000 cash down payment and gave OPLAD a note for $4,500,000 secured by a trust deed on the Jones Ranch. The note bore interest at 10% but no principal payments were due for three years. In addition, Security Alliance Corp. prepaid $1,350,000 interest on the note.

A. Simultaneous with the sale of the Jones Ranch to the corporation owned by Mrs. Alvin Dworman, OPLAD purchased three parcels of real property from Mr. Alvin Dworman for a total price of $4,982,000. OPLAD paid Dworman $3,050,000 in cash, assumed certain existing liabilities on the properties, and gave Mr. Dworman notes for the remainder of the purchase price.

B. The $3,050,000 in cash given by OPLAD to Mr. Dworman was used in part, as follows:

$800,000 was used as a down payment for the purchase of the Jones Ranch by the corporation wholly owned by Mrs. Dworman;

$1,350,000 was used as a prepayment of interest in connection with the purchase of the Jones Ranch by the corporation wholly owned by Mrs. Dworman.

C. In the Dworman transaction OPLAD paid out cash in the amount of $900,000 and recorded an immediate profit of approximately $2,050,000, the difference between OPLAD's cost basis of $3,250,000 and the gross sales price of $5,300,000. OPLAD in recording this purported profit wholly ignored its purchases of real property from Mr. Dworman. OPLAD's purported profit from this transaction was included in the $43,856,000 net income reported to the public for the second quarter of 1970. The manner in which this purported profit was earned was never disclosed to the public nor to Occidental shareholders. Nor has Occidental disclosed that the purported profit from this transaction was improperly recorded.

Quarter Ending March 31, 1970

13. On or about May 13, 1970 Occidental issued a press release. Thereafter, on or about May 22, 1970, Occidental issued a "Progress Report" to shareholders for the three months ended March 31, 1970, which report was signed by defendant Hammer and mailed to Occidental shareholders. The press

release and "Progress Report" each stated that in the quarter ending March 31, 1970 Occidental's net income was $42,370,000, a slight decline from the $42,905,000 which it had reported for the first quarter of 1969, but that earnings available to common shareholders had increased from $35,[illegible]0,000 in 1969 to $37,056,000 in 1970. The "Progress Report" further stated: "This despite a general slowdown in the country's gross national product and weakened petroleum product prices in Europe, your company was able to maintain its profits at virtually the same high level as that of last year."

14. The press release of May 13, 1970 and the "Progress Report" of May 22, 1970 failed to disclose that the $42,370,000 reported as Occidental's net income for the first quarter of 1970 was derived in part from approximately $4,245,834 in purported profits resulting from two financing transactions which had been structured to take on the appearance of land sales and in which Occidental's recognition of profits was improper. The press release and "Progress Report" further failed to disclose that Occidental's reported net income for the first quarter of 1970 was also derived in part from an improper $5,000,000 accounting adjustment made on the books of Occidental on the last day of the quarter. In addition, the press release and "Progress Report" failed to disclose that approximately $3,000,000 resulting from the sale of an interest in certain coal leases was improperly included in Occidental's net income for the quarter as more fully described below in paragraphs 20 through 20F.

15. The first financing transaction referred to in paragraph 14 above occurred on or about March 31, 1970 when OPLAD purchased 1,240 acres of land from Rhodell Farms, Inc., a corporation wholly owned by one Richard S. Rhodes, for $2,500,000 in cash. On that same day, OPLAD resold 1,000 of the acres purchased from Rhodell Farms, Inc. to Arizona Construction Company for $4,100,000 and recorded a purported profit of $2,100,000. Occidental included this purported profit in the net income which it reported to shareholders for the first quarter of 1970. Arizona Construction Company paid Occidental $800,000 in cash as a down payment and gave OPLAD a note for $3,300,000 secured by the 1,000 acres and certain other lands owned by Richard S. Rhodes.

A. The $2,500,000 which OPLAD paid to Rhodell Farms, Inc. was used as follows:

$800,000 was transferred to Arizona Construction Company to be used as a down payment in connection with Arizona Construction Company's repurchase of the 1,000 acres from OPLAO;

$1,411,000 was used to pay some of the obligations of Rhodell Farms, Inc.

$289,000 was used by Rhodell Farms, Inc. as working capital.

B. On March 31, 1970 Arizona Construction Company was a corporation which was 50% owned by Richard S. Rhodes and 50% owned by Dean Lufkin. Prior to execution of the transaction between OPLAO and Arizona Construction Company, however, OPLAO had agreed to lend Rhodes the money necessary for Rhodes to purchase Lufkin's interest in Arizona Construction Company. Shortly after Arizona Construction Company purchased the land which had originally been owned by Rhodell Farms, Inc., OPLAD did, in fact, advance $75,000 which was used by Rhodes to buy out Lufkin's interest in Arizona Construction Company.

C. OPLAD recorded $2,100,000 in purported profits from this transaction on March 31, 1970 and this purported profit was included in the $42,370,000 net income which Occidental reported to the public and to its shareholders for the first quarter of 1970. Occidental never disclosed the manner in which it earned this purported profit, nor did Occidental disclose that Arizona Construction Company's and Rhodes' ability to pay their note to OPLAO was in doubt.

16. The second financing transaction referred to in paragraph 14 above occurred on or about March 31, 1970 when OPLAD executed a transaction in which it purchased certain farm land from Agro Resources, Inc., and immediately resold the same land to Hobbs Land and Cattle Company, recognizing a profit on the resale of $2,145,834. In purchasing the land from Agro Resources, Inc., OPLAD paid $5,754,166.10.

A. The $2,000,000 in cash which OPLAD paid to Agro Resources, Inc. was used as follows:

$1,000,000 was transferred to Hobbs Land and Cattle Company and was used as a down payment in the repurchase of the land from OPLAD by Hobbs Land and Cattle Company;

$1,000,000 was used to pay certain creditors of Agro Resources, Inc.

B. Agro Resources, Inc., is a corporation 20% owned by John Schultz who is its president and 80% owned by a group of fourteen investors. Hobbs Land and Cattle Company is a corporation 100% owned by John Schultz, who formed the corporation for the purpose of repurchasing the land from OPLAD, and who is president of the corporation.

C. Hobbs Land and Cattle Company paid OPLAD a sales price of $7,900,000 in the following manner:

$1,000,000 as a cash down payment, which money was originally derived from OPLAD;

$3,754,166.10 was paid by taking on the obligation for the same liabilities which OPLAD had taken on in purchasing the land from Agro Resources, Inc.;

$3,145,834 was paid in the form of a note given by Hobbs Land and Cattle Company to OPLAD.

To secure Hobbs Land and Cattle Company's obligation to OPLAD, Hobbs Land and Cattle Company pledged certain farm machinery and equipment, which machinery and equipment was provided by Agro Resources, Inc., for the purpose of allowing Hobbs Land and Cattle Company to pledge it as security. Title to the machinery and equipment was transferred to Hobbs Land and Cattle Company in exchange for an unsecured note given to Agro Resources, Inc., at a time when it was well-known that Hobbs Land and Cattle Company had neither the resources nor a source of income from which it could derive funds to pay the note.

D. On or about June 12, 1970 John Schultz wrote a letter to the shareholders of Agro Resources, Inc., in which he described the transaction with OPLAD in pertinent part as follows:

> "In substance, Agro borrowed $1,000,000 from Occidental but must repay $3,200,000 in five years at 10% interest on the unpaid balance. For cogent reasons Occidental could not make a pure loan . . . ."

Schultz further stated that all of the shares of Hobbs Land and Cattle Company, which was incorporated for the sole purpose of reacquiring the land from OPLAD, "are held in trust for the benefit of Agro."

E. OPLAD recorded a $2,145,834 profit on this transaction on March 31, 1970 and this profit was included in the net income which Occidental reported to the public and to its shareholders for the first quarter of 1970. No disclosure was made of the manner in which this purported profit was earned. Nor was it disclosed that OPLAD had not received adequate collateral for Hobbs Land and Cattle Company's obligation to justify recognition of a profit in the first quarter of 1970. Occidental did not disclose that this purported profit was improperly recorded.

17. On or about March 31, 1970 Occidental made an improper consolidating adjusting journal entry which adjustment resulted in the improper recognition of $5,000,000 in net income in the first quarter of 1970. This entry improperly increased income by giving effect to a proposed contract between Oxy-Libya, an Occidental subsidiary, and A.G.I.P., S.p.A., an Italian oil company, at a time when no contract had been executed and at a time when no contract

could be performed without approval of the Libyan Arab Republic, which approval had not been obtained as of March 31, 1970. Occidental included the $5,000,000 resulting from the accounting adjustment in the net income which it reported to the public and to Occidental shareholders for the first quarter of 1970. Occidental did not disclose the manner in which the net income had been derived nor did it disclose the impropriety of the accounting adjustment which resulted in this increase of reported net income.

Quarter Ending September 30, 1969

18. On or about October 27, 1969 Occidental issued a press release and, thereafter, on or about November 4, 1969, Occidental issued a "Progress Report" to shareholders for the six months ended September 30, 1969, which report was signed by defendant Hammer and mailed to Occidental shareholders. Said press release and "Progress Report" each stated that for the third quarter of 1969 Occidental had net income of $49,134,000 and compared that amount to the $37,785,000 earned in the third quarter of 1968. The "Progress Report" further stated:

> "Your management is gratified to report that in the midst of the tight money situation, the battle to halt inflation, and the recent change of Government in Libya, Occidental achieved new all time records for revenues and earnings in both the first nine months and the third quarter of 1969."

The "Progress Report" went on to state that the income reported was all from operations.

19. The press release of October 27, 1969 and the "Progress Report" of November 4, 1969 did not disclose that approximately $14,042,000 of the $49,134,000 reported as net income for the third quarter of 1969 resulted directly from extensive accounting adjustments and changes made in the accounting systems of Hooker Chemical Corporation, a large consolidated subsidiary of Occidental, and from accounting adjustments made at Occidental's European Complex. Nor did the press release or the "Progress Report" disclose that the changes and adjustments related in large part to the first and second quarters of 1969 and to years prior to 1969, and that Occidental, by including all of these changes and adjustments in the third quarter of 1969, had elected

the misleading impression that Occidental earned a profit of $49,134,000 in the third quarter of 1969, and that all of this profit was from operations. The manner in which Occidental achieved "new all time records for revenues and earnings" in the third quarter of 1969 was not disclosed to Occidental shareholders or to the public.

Coal Transactions Recurring in Quarters Ending June 30, 1970, March 31, 1970 and December 31, 1969

20. During the years 1969 and 1970 Occidental entered into a series of transactions in which it purportedly sold interests in certain coal leases to a Japanese trading company which transactions resulted in Occidental's recordation of profits on a current basis in each of the quarters ending June 30, 1970, March 31, 1970, and December 31, 1969.

A. On or about December 20, 1969, Occidental entered into an agreement with Nissho-Iwai Co., Ltd., a Japanese trading company, pursuant to which Nissho-Iwai Co., Ltd., agreed to provide Island Creek Coal Company, an Occidental subsidiary, with a line of credit not to exceed $25,000,000, to be used by Island Creek to develop a mine to be known as Virginia Pocahontas #4 ("VP #4"). This loan was not to accrue interest for five years and thereafter Island Creek was to pay 6.5% interest on the loan for a period of fifteen years. Simultaneous with the execution of the loan agreement, Island Creek and Nissho-Iwai Co., Ltd., executed a sales agreement pursuant to which Nissho-Iwai Co., Ltd., was to purchase 30,000,000 tons of coal, which was the entire projected production of VP #4, for approximately a 15 year period. The mine when working at full capacity was scheduled to produce approximately 2,000,000 tons of coal a year. The agreement for the sale of coal produced by VP #4 contemplated renewals for successive 5 year periods. The total coal reserves of VP #4 was estimated to be between 70,000,000 tons and 80,000,000 tons.

B. On the same day on which the loan agreement and the sales agreement were executed, Island Creek sold to Nissho-Iwai American Corporation, a wholly owned subsidiary of Nissho-Iwai Co., Ltd., a 49% interest in certain coal leases contained within the area scheduled to be developed into VP #4. The initial production of VP #4 is scheduled to be derived from these leases, which are estimated to contain approximately 5,000,000 tons of coal reserves. The reserves contained in these leases are scheduled to be exhausted by 1978. Island Creek took back from Nissho-Iwai American Corporation the right to cancel the sale of the interest in the leases in the event that Nissho-Iwai Co., Ltd., did not loan Island Creek the $25,000,000 which it had agreed to provide. Before making the loan Nissho-Iwai Co., Ltd., had to obtain the approval of the Japanese government, which approval it had not obtained by the end of December 1969.

C. The sales price for the 49% interest in the leases contained in the area that is to become VP #4 was $4,500,000. Nissho-Iwai American Corporation paid $675,000 as a cash down payment and gave Island Creek a note for the remaining $3,825,000. The note was a general corporate obligation of Nissho-Iwai American Corporation and was secured by a deed of trust on the interest in the leases sold. The agreements relating to the transfer of the interest in the coal leases provided that Island Creek would construct and operate VP #4 and that Island Creek would act as exclusive sales agent for the coal produced from the leases in which Nissho-Iwai American Corporation purchased an interest. Payments on the note were scheduled to be deducted from the amounts owed Nissho-Iwai by Island Creek pursuant to this marketing arrangement. All of the coal which Island Creek was to sell as agent for Nissho-Iwai American Corporation was already committed to Nissho Iwai Co., Ltd., pursuant to the 30,000,000 ton sales agreement. Island Creek guaranteed that the cost to Nissho-Iwai American Corporation of producing the coal contained in the leases in which Island Creek transferred a 49% interest would not exceed a certain ceiling. Above this ceiling all costs were to be absorbed by Island Creek.

D. Occidental reported $3,983,000 as a purported profit from the sale of the 49% interest in the leases in December 1969. This amount was included in Occidental's net income for the fourth quarter of 1969. Occidental did not disclose the manner in which this purported profit was earned.

E. On or about March 31, 1970 Island Creek sold to Nissho-Iwai American Corporation an additional 25.2% interest in the same leases in which they had sold a 49% interest on or about December 20, 1969. The March 30, 1970 sale resulted in a purported profit of approximately $2,643,000 being recorded on a current basis by Island Creek and included by Occidental as net income for the first quarter of 1970 in its report to the public and to Occidental shareholders. Thereafter, on or about June 30, 1970 Island Creek sold to Nissho-Iwai American Corporation an additional 16.8% interest in the same leases in which Island Creek had already sold the 49% interest and the 25.2% interest. The June sale resulted in a purported profit of approximately $1,775,000 being recorded by Island Creek on a current basis in the second quarter of 1970 and reported to Occidental shareholders and to the public as net income for the second quarter of 1970. Both the March sale and the June sale of interests in the coal leases were effected on terms pursuant to which Nissho-Iwai American Corporation paid a 15% cash down payment and gave Island Creek notes for the remainder of the purchase price. Payments of the notes were scheduled to be made out of amounts which Island Creek would owe to Nissho-Iwai American Corporation from the arrangement pursuant to which Island Creek would act as exclusive sales agent for the coal produced from the leases in which the interests were sold.

F. With respect to each of the transactions described in paragraphs 20 through 20E, no disclosure was ever made to shareholders that Occidental had improperly included in its net income, as reported to shareholders and to the public for the first and second quarter of 1970, purported profits from these sales of interests in coal leases which purported profits were improperly recorded on a current basis.

Quarter Ending June 30, 1969

21. On or about July 31, 1969 Occidental issued a press release. Thereafter, on or about August 12, 1969, Occidental issued a "Progress Report" to shareholders for the six months period ended June 30, 1969, which report was signed by defendant Hammer and mailed to Occidental shareholders. Said press release and "Progress Report" each stated that Occidental's net income for the second quarter of 1969 was a record $47,942,000 and that earnings available to common shareholders for the first six months of 1969 were double the earnings available to common shareholders for the first six months of 1968.

22. Said press release of July 31, 1969 and said "Progress Report" of August 12, 1969, failed to disclose that the $47,942,000 reported as Occidental's net income for the second quarter of 1969 was derived in part from the recording of a $6,393,000 profit from the purported sale of a 49% interest in certain coal leases in Island Creek's Virginia Pocohontas #3 mine ("VP #3") to Tokyo-Boeki, Ltd., a Japanese trading company.

A. Soon after the 49% interest in the leases was sold to Tokyo-Boeki, Ltd., Island Creek, acting as exclusive sales agent for Tokyo-Boeki, Ltd., committed the coal production from those leases to certain sales contracts which had been executed before Tokyo-Boeki, Ltd., purchased an interest in the leases. This was done at a time when the full production of VP #3 had not been committed to coal purchasers. In exchange for the 49% interest in the leases, Tokyo-Boeki, Ltd., paid Island Creek 15% of the $7,000,000 purchase price in cash and executed a note for the remainder. Payments of interest and principal on the note were deferred, and payments were scheduled to be derived from the marketing arrangement pursuant to which Island Creek acted as exclusive sales agent for the coal produced from the interest in the leases owned by Tokyo-Boeki, Ltd. Island Creek guaranteed that the cost of producing the coal to Tokyo-Boeki, Ltd. would not exceed a set ceiling, and Island Creek was bound to absorb any cost above that ceiling.

B. Occidental did not disclose to the public or to Occidental shareholders the manner in which $6,393,000, or approximately 13% of the $47,942,000 which Occidental reported to be its net income for the second quarter of 1969 was derived. Nor did Occidental disclose that approximately 13% of the income reported for the second quarter of 1969 was derived from the sale of a capital asset. Nor did Occidental disclose that the $47,942,000 reported as net income for the second quarter of 1969 was in part derived from the improper reporting of $6,393,000, a profit on a current basis from the sale of a 49% interest in certain leases to Tokyo-Boeki, Ltd.

23. The transactions and accounting devices set out in paragraphs 9 through 22 above, materially changed the net income of Occidental reported to shareholders in each quarter as follows:

Matters Included in Complaint		% Relationship to Reported Net Income
June 30, 1970		
Jenkins Ranch-- Junction City	$ 2,985,625	6.8%
Dworman	2,087,686	4.8%
Nissho-Iwai	1,775,000	4.0%
Total	$ 6,848,311	15.6%
Reported Net Income	$43,856,000	
March 31, 1970		
Rhodell Farms	$ 2,100,000	5.0%
Agro-Hobbs	2,145,000	5.1%
A.G.I.P.	5,000,000	11.8%
Nissho-Iwai	2,643,000	6.2%
Total	$11,888,000	28.1%
Reported Net Income	$42,370,000	
December 31, 1969		
Nissho-Iwai	$ 3,983,000	11.5%
Reported Net Income	$34,774,000	
September 30, 1969		
Accounting Adjustments and Changes	$14,042,000	28.6%
Reported Net Income	$49,134,000	
June 30, 1969		
Tokyo-Boeki	$ 6,393,000	13.3%
Reported Net Income	$47,942,000	

24. By reason of the foregoing, defendants herein singly and in concert have violated, are violating and are continuing to violate Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b) and Rule 10b-5, 17 CFR 240.10b-5 thereunder.

COUNT II

Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b) and Rule 10b-5, 17 CFR 240.10b-5 Thereunder

25. Paragraphs 1 through 6 are hereby realleged and incorporated into this count.

26. Since on or about January 1, 1966 to the present, defendants Occidental and Hammer, directly and indirectly by use of the means and instrumentalities of interstate commerce and the mail, have employed a device, scheme and artifice to defraud, have made untrue statements of material facts and have omitted to state material facts necessary in order to make the statements made, not misleading, and have engaged in acts, practices and a course of business which operate and would operate as a fraud and deceit upon persons in connection with the purchase and sale of the common stock and other securities of Occidental.

27. As a part of said scheme, artifice and fraudulent course of business, defendants Occidental and Hammer have issued and caused to be issued to the public press releases, including, but not limited to, a press release issued on or about May 20, 1970, in which defendant Hammer made certain statements which were false and misleading and failed to make other statements necessary in order to make the statements made not misleading.

A. Defendant Hammer stated that Occidental's average crude oil production in Libya for the first four months of 1970 was 782,000 barrels per day and that daily production for April had reached approximately 800,000 barrels. Defendant Hammer failed to disclose that for the two weeks immediately prior to the issuing of the press release total production in Libya had decreased to an average of approximately 740,000 barrels per day. Defendant Hammer also failed to state that as of the date of the issuance of the

press release, representatives of Occidental were in the process of negotiating with the Libyan government in an attempt to persuade that government not to decrease production. On May 25, five days after issuance of the press release, the Libyan government did drastically decrease Occidental's production to approximately 485,000 barrels per day.

B. Defendant Hammer stated in the same press release that he expected coal production from Island Creek to increase from the approximately 30,000,000 tons produced in 1969 to over 39,000,000 tons in 1970. Hammer failed to disclose that Occidental's internal management report at the time of the press release estimated that production would be approximately 36,464,000 tons for 1970. Hammer also failed to state that this same internal management report indicated that of this latter amount, 3,719,000 tons was to be produced from mines which Island Creek supervised but did not own.

C. Defendant Hammer stated in the same press release that he expected Occidental to realize a 10% increase in earnings in 1970 as compared to 1969, assuming Occidental and the Libyan government would reach an acceptable pricing agreement for crude oil. Hammer failed to state that Occidental's internal management report at the time of the press release stated that Occidental could not indicate an ascertainable source for $47,095,000 of the profits necessary to reach this goal of a 10% increase over 1969. As of the date of said press release, Occidental's management report estimated that without locating such additional sources of income, 1970 net income would be $146,264,000 or approximately a 17% decrease as compared to 1969 net income rather than the 10% increase predicted by Hammer.

28. By reason of the foregoing, defendants herein singly and in concert have violated, are violating and are continuing to violate Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b) and Rule 10b-5, 17 CFR 240.10b-5, thereunder.

COUNT III

Section 10(b) of the Securities Exchange Act 15 U.S.C. 78j(b) and Rule 10b-5, 17 CFR 240.10b-5 thereunder

29. Paragraphs 1 through 6 are hereby realleged and incorporated in this count.

30. Since on or about January 1, 1966 to the present, defendants Occidental and Hammer directly and indirectly, by use of the means and instrumentalities of interstate commerce and the mails, have employed a device, scheme and artifice to defraud, have made untrue statements of material facts and have omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and have engaged in acts, practices and a course of business which operated and would operate as a fraud and deceit upon persons in connection with the purchase and sale of the common stock and other securities of Occidental.

31. As a part of the aforesaid, defendants issued and caused to be issued, certain press releases and filed and caused to be filed with the Commission certain documents which press releases and documents contained financial information for the years ending December 31, 1969 and December 31, 1970, for the nine months ending September 30, 1970 and the nine months ending September 30, 1969 which financial information included and incorporated some or all of the purported profits more fully described in paragraphs 9 through 22 above. In connection with said press releases and documents filed with the Commission, no disclosure was made concerning the manner in which these purported profits were earned. Nor was it disclosed that these purported profits were improperly recorded.

32. By reason of the foregoing, defendants herein singly and in concert have violated and are violating and will continue to violate Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b) and Rule 10b-5, 17 CFR 240.10b-5 thereunder.

Wherefore, the plaintiff Commission respectfully prays and demands:

That this Court issue a preliminary injunction and final judgment restraining and enjoining defendants Occidental Petroleum Corporation

and Armand Hammer, and each of them, and their officers, agents, employees, attorneys, successors, assigns and those persons in concert or participation with them from directly or indirectly violating or aiding and abetting violations of Section 10(b) of the Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5 thereunder in connection with the purchase and sale of the securities of Occidental Petroleum Corporation, or the securities of any other issuer.

That this Court grant such other and further relief as it may deem just and proper.

Respectfully submitted,

Wallace L. Timmeny
Assistant Director

Joseph M. Berl
Branch Chief

John G. Carleton
Attorney

Attorneys for Plaintiff
Securities and Exchange Commission
500 North Capitol Street, N.W.
Washington, D.C. 20549
Telephone No. 202-755-1246

Kevin Thomas Duffy
Administrator
New York Regional Office
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10007

Dated: March 4, 1971

the person mentioned and described in said papers

AFFIDAVIT OF SERVICE

State of New York)
: ss.:
County of New York)

MAUREEN MOTHERWAY being duly sworn deposes and says: I am not a party to this action. I am over 18 years of age and reside in Queens County, N.Y.C. On October 1, 1974, I served the Joint Appendix and Plaintiff-Appellants Brief upon the following attorneys at the following respective addresses by depositing copies of the same in post-paid properly addressed wrappers in an official depository under the exclusive care of the United States Postal Service within the State of New York:

ROGERS & WELLS
Attorneys for Defendants-Appellees,
Dreyfus Corporation, Howard Stein,
Richard A.M.C. Johnson, Julian M.
Smerling and Lawrence M. Greene
200 Park Avenue
New York, New York 10017

WORMSER, KIELY, ALESSANDRONI,
MAHONEY & MC CANN
Attorneys for Defendant-Appellee,
International Telephone and Telegraph
Corp.
100 Park Avenue
New York, New York 10017

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Defendants-Appellees,
Lazard Freres & Co., Felix G. Rohatyn
and Andre Meyer
345 Park Avenue
New York, New York 10022

SULLIVAN & CROMWELL
Attorneys for Defendant-Appellee
Marine Midland Banks, Inc.
48 Wall Street
New York, New York 10005

CONDERT BROTHERS
Attorneys for Defendant-Appellee
Dreyfus Marine Midland Management Corp.
200 Park Avenue
New York, New York 10017

STROOK, STROOK & LAVAN
Attorneys for Defendant-Appellee
The Dreyfus Fund, Inc.
61 Broadway
New York, New York 10006

Maureen Mottenway

Sworn to before me
this 1st day of October, 1974.

Dermot G. Foley

DERMOT G. FOLEY
Notary Public, State of New York
No. 02-1268750
Qualified in Bronx County
Commission Expires March 30, 1975